

THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

by J. Pictet

*Vivos voco, mortuos plango,
fulgura frango*

Schiller "Die Glocke"

I. WHAT IS INTERNATIONAL HUMANITARIAN LAW?

For some years it has been customary to call "humanitarian law" that considerable portion of international law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual. This expression of humanitarian law appears to combine two ideas of a different character, the one legal and the other moral. Now, the provisions which are the subject under study are, as will be seen later, precisely a transposition in international law of considerations of a moral order, and more especially humanitarian. This then would seem to be a satisfactory designation.

Between 1948 and 1950 remarkable extension and impetus were given to humanitarian law, three memorable years which will without doubt mark a decisive step in the struggle for the defence of the human person. In 1949 there was the concluding of the four Geneva Conventions for the protection of the victims of war, revised and completed. Similarly, in the sphere of Human Rights, 1948 saw the proclamation of the Universal Declaration and 1950 was the year of the European Convention on Human Rights. Humanitarian law has thus been fully accepted and is no longer a mere branch of international law but a province in its own right with a wide measure of autonomy.

A closer look should now be taken at the notion of humanitarian law by determining its contents and attempting to define both it and the offshoots of which it is composed.

The term humanitarian law may be considered under two different aspects, the one wide and the other narrow.

1) International humanitarian law, in the wide sense, is constituted by all the international legal provisions, whether written or customary, ensuring respect for the individual and his well-being.

Humanitarian law now comprises two branches: the law of war and human rights.

Some legal experts, such as Professor Milan Bartos, would like to add yet another branch; the law of peace, that is to say, the collection of provisions tending to maintain peace and to exclude war as a means of resolving disputes between communities. This is also known as the *jus contra bellum*. At present, however, this addition has not been agreed so that it will not be a subject for discussion. In fact, if this important legal phase is of an evidently humanitarian character, it aims less directly at the individual than do other disciplines of humanitarian law and also presents a political aspect which one should not under-estimate.

The first branch of humanitarian law is, as we have already said, the law of war. This term has also two aspects, one wide and the other narrow.

2) The law of war, in the wide sense, has as object to regulate hostilities and attenuate their hardships in so far as military necessity permits.

The law of war is in its turn sub-divided into two branches: that of The Hague, or the law of war properly so-called, and that of Geneva, or humanitarian law.

3) The law of The Hague, or the law of war properly so-called, determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm.

These provisions were principally the result of The Hague Conventions of 1899, revised in 1907. From these must, of course, be

excluded those most significant portions in the Geneva regulations which between 1929 and 1949 covered the status of prisoners of war, that of the wounded and shipwrecked in maritime warfare and also that of civilians in occupied territory. The above definition is new and takes the "division of waters", realized in 1949, into account.

The Hague regulations also include Conventions not bearing the name of the Netherlands city, such as the St. Petersburg Declaration of 1868, prohibiting the use of certain projectiles in time of war and the Geneva Protocol of 1925 condemning asphyxiating, poisonous or other gases and bacteriological methods.

If the efforts of the International Committee of the Red Cross to ensure minimum protection for the civilian population against the dangers of indiscriminate warfare resulted in a diplomatic instrument, this should, by its very nature, rather be the province of the law of The Hague.

4) The law of Geneva, or humanitarian law properly so-called, tends to safeguard military personnel placed "hors de combat", as well as persons not taking part in hostilities.

Since 1949, the law of Geneva has been put in concrete form by the four Conventions of that name. This monumental legal work of over four hundred articles is at the same time the most recent codification and also the most complete of the standards giving protection to the individual in the case of armed conflict. It no doubt represents, at least as far as size is concerned, three-quarters of the law of war in existence today.

Offering a more specifically humanitarian character, a primary element of civilization and peace, the law of Geneva incarnates the very ideal of the Red Cross. It was moreover the International Committee in Geneva which gave it its initial impulse and origin. It is therefore sometimes called the "law of the Red Cross".

In 1949, as we have already mentioned, a vast portion of the Hague law passed, considerably extended, into the sphere of Geneva; such, for example, as the protection of civilians, notably in the occupied countries. This meant that, for the first time, the Geneva Conventions covered individuals who did not belong to the fighting forces and who were neither wounded, sick, shipwrecked nor captives. The purpose of the new provisions was, to some extent,

to prevent civilians from becoming the direct victims of war. One can however also claim that from the mere fact of their finding themselves under enemy occupation, civilians no longer enjoy their full liberty and have to submit to hostilities to a larger or less degree.

Another factor enables one to differentiate between the movement of Geneva and that of The Hague. The Geneva texts have been drawn up solely for the benefit of the individual. Generally speaking they do not accord rights between States. The case is otherwise for the laws of war, whose object is to regulate operations and which are still partly based on military necessity. In Geneva an era has opened giving primacy to the individual and the principles of humanity.

Within humanitarian law properly speaking, certain medico-legal circles distinguish in addition an "international medical law", covering the provisions which aim at ensuring medical relief and which apply to the wounded, sick and medical personnel.

It now remains for us to define the second great branch of humanitarian law as follows:

5) Legislation of Human Rights has as object to guarantee at all times for individuals the enjoyment of fundamental rights and liberties and to preserve them from social evils.

That which essentially distinguishes this field from the previous one, is that it finds its application in time of peace as well as in time of war. In fact, Human Rights represent the most generous principles in humanitarian law, whose laws of war are only one particular and exceptional case, which appears precisely at times when war restricts or harms the exercising of human rights.

Here, the promoting institution, on the universal level, is not the Red Cross, but the United Nations Organization, itself the successor of the League of Nations. Also contributing, in their geographical framework, are such movements as the Council of Europe and the Organization of American States.

Under this wide heading, one can also add not only the codification of Human Rights, but also, amongst others, the provisions condemning slavery, the white-slave traffic and the drug traffic, the Convention relative to the status of refugees and, to a certain extent, labour legislation.

II. MORAL SOURCES

1. Definitions

Before discussing the foundation of humanitarian law, a definition should first be made of some of the essential terms which will be employed.

Confusion sometimes arises between human and humanitarian, humanism and humanitarianism, abstract expressions all deriving from the same origin, which is Man.

The term *human*, in its first sense, means all that concerns Man. However, in the meaning which is of interest to us here, "human" denotes a man who is good to his fellow beings. What then is goodness? It is a propensity for doing good. But what then is the good? It is all actions which at a given moment appear to be just, useful, reasonable and generous. Goodness is therefore the abstract idea of what is good. In this way, the honest man is guided by the idea of goodness as the artist is of his notion of beauty.

Goodness is a complex motive in which can be discerned several kindred qualities or sentiments present in varying degrees, such as kindness, generosity, devotion, faithfulness, tenderness, pity, compassion, a spirit of mercy, gentleness, patience, clemency, toleration, constancy, forbearance, commiseration and others. To be good is also to be amiable, cordial, sensitive, kind, charitable, serviceable, ready to help, foreseeing, benign, docile, good-natured, peaceful and magnanimous.

If one wishes to summarize all that and interpret it from the practical point of view, without employing the same terms, one would say the following. Animated by favourable intentions, the good man is touched by the suffering of others and he tries to alleviate them; showing them respect and affection, he protects and helps them. In other words, he devotes himself to them. With complete equality of mind he suffers misfortune, is not carried away by anger against anyone, and forgives joyfully.

Humanity is therefore the sentiment or attitude of someone who shows himself to be human. With Littré's dictionary, we would define humanity as being "a sentiment of active goodwill towards

mankind". This is the definition we will be giving later on to the essential principle of humanitarian law, preferring it to all others, since it is indeed its driving force. This term, however, has another meaning: it also denotes human nature and even the human species in general. One should therefore beware of ambiguities.

Close to humanity come pity and charity.

Pity is one of the mainsprings of charity. It is a spontaneous movement in the presence of the suffering of others. Someone who feels pity obeys no order nor reason, but an instant reaction of affection. Littré defines pity as being "that sentiment which sees suffering at a glance and goes to its relief". It is also called compassion, "that stirring of the soul which makes one responsive to other people's distress", according to Larousse. Pity is like an outpost of charity.

Charity is an effort which is required of us, either inwardly or from outside and which becomes as second nature to relieve and put an end to the suffering of others. There is also a risk of confusing terms, for the word can also be taken in the sense of alms. Now, to dispense alms is not to be recommended, except where charity on a larger scale is lacking and is often impossible to realize in practice.

Charity, especially in the sense given it by Christian morality, is synonymous with the love of others.

Most modern languages only have a single word, "love" in English, to express two notions as different from each other as love, in the sense of desire and love meaning devotion. The inadequacy of language can be seen as soon as abstract ideas are involved. One is therefore obliged to resort to two words of ancient Greek: *eros* and *agape*, both of which are translated as love.¹

Eros is egocentric, passionate love, the desire to appropriate something for oneself, the search for one's own happiness. This feeling, which may take a very lofty form, governs the elective affinities, such as the love of a man and woman, or friendship. Its object may also be virtue, art, pleasure, knowledge or wealth.

¹ See Max HUBER, *The Good Samaritan*, Gollancz, 1945, pp. 44 and 46; Professor F. LEENHARDT, *Morale naturelle et morale chrétienne*, Alma Mater, Nos. 26 and 27, 1946.

Agape is altruistic, disinterested love whose object is essentially people. The person who experiences it is not thinking of his happiness, but of that of the being he loves. This feeling sometimes demands a certain amount of self-control; it may result from an effort which we have been required to make, its object may even be the enemy or a criminal. It is naturally in the sense of *agape* that we mean love of others.

This distinction is prone to one grave defect, that of relating two heterogenous spheres to each other, the one psychological, the other moral. *Eros* acts from instincts of conservation, whilst *agape* is a selection operated by morality and justified by the necessity of directing society towards helping others and fellowship. Moreover, feelings cannot be circumscribed within rigid limits. Often in life, the two sentiments will animate the same person in varying degrees which will consequently closely overlap. It was, however, necessary to differentiate between them to avoid perpetuating confused thinking which has already troubled so many minds.

We will now pass on to the word *humanitarian*. It qualifies any action beneficent to men. This notion is realized notably in humanitarianism. In the expression "humanitarian law", the adjective has a more restricted sense, since we have defined this law as ensuring respect for the individual and his well-being.

Humanism is a philosophical doctrine whose ultimate object is the human being. This conception therefore surpasses the subject of this study.

As regards *humanitarianism*, this is the universal social doctrine which aims at the good of all mankind. Since humanitarian law derives from this, we will now deal with this subject.

2. Modern humanitarianism

It has been said that humanitarian law proceeds from "natural law". One should, as a start, know what this means.

Is it the old belief of the mediaeval theologians, taken up by Grotius and his successors, of an immanent, eternal and universal law? Unfortunately, the moral quality of a concept is in no way a guarantee of its exactitude. In reality, experience teaches us that law

is built up stone on stone, by dint of patient efforts of reasoning and harmony.

To the idea of a natural law implying a pre-existing plan, which one is moreover incapable of discovering, one should prefer the notion of an ideal order, superior to the present one. We go to meet it by an empirical and slow progress, to the extent that we rid ourselves of prejudices and build a better world. This juridical order will give to the individual the maximum rights compatible with the good organization of society and will be based only on the aspirations common to individuals of which humanity is composed. This is still, of course, if only for us, but a working hypothesis.

There will certainly always be a divergence between positive law and that which appears just to the majority of our contemporaries. For the law is constantly behindhand in relation to the logical and moral interpretation of social facts. It therefore tends to complete and improve itself in order the better to comply with what is required of it. In fact, these very requirements evolve with the customs of the time, so that something which was natural two centuries ago seems incongruous today.

We would therefore define natural law, the source of humanitarian law, as *all the rights which every man demands for himself and which he is at the same time prepared to accord to others*. All the rest is but a dream. Such a definition is only valid at a determined time and place. However, in a period when civilizations are tending to merge with each other, natural law is also becoming uniform itself.

Humanitarian law receives its impulse from moral science all of which can be summed up in one sentence, "do to others what you would have done to yourself". This crystallizes the wisdom of nations and is the secret of happiness, or at least, of the best order of society. This fundamental precept can be found, in an almost identical form, in all the great religions, Brahmin, Buddhist, Christian, Confucian, Islamic, Jewish and Taoist. It is also the main prop of the positivists who do not base themselves on precepts of any given religion, but on social facts, considered objectively, through their own reasoning alone. One could doubtless find other emanations, other echoes, since it is a universal truth because it fully conforms to human nature and to the needs of social life.

Modern humanitarianism originates from this idea which is a developed, rationalized form of justice and charity tending to make life more worthy of being lived.

Humanitarianism is nothing other than an attempt at organizing relationships between human beings on the basis of a compromise between their respective interests, it being understood that the practice of charity and justice represents part of a high dividend from such interest.

It is the end of a long effort of reflection tending to define the outlines of a social order, which should be the most advantageous for all. This order is not the same depending on the stage of civilization reached in a given country, but it does seem to converge in the direction of an acceptable middle-term. It is a product of experience and reasoning, all of whose elements justify themselves in a practical manner as a matter of common sense, by reason of its ultimate purpose, which is to provide the maximum happiness for the largest number. For collective well-being is in fact but the sum total of individual happiness.

In humanitarianism there is mingled a certain amount of folly, to strive for an ideal which, by definition, is inaccessible, with a great deal of realism.

It is a doctrine free from any religious or ideological tie. Responding to universal needs and, by definition, addressing itself to people of all kinds and conditions, it cannot owe allegiance to any mystic outside its own. It is on the level of human experience, taking mankind as its object, men as its instruments whose aspirations it interprets and whose natural impulses it utilizes.

Humanitarianism is not a religion opposing itself to other religions, a moral philosophy set up in opposition to other moral codes. It does however coincide with the precepts of many religious and moral codes. It is the point at which the most diverse opinions coincide and where they merge after sifting and the elimination of much that is tarnished.

No longer speaking of malediction striking humanity, of guilt or a fatal destiny, humanitarianism has really overcome one of the chief collective inhibitions from which the world used to suffer. It has preserved from its moral and religious sources only what was rational and universal. Having done so it has in no way tried to

deify man. It has merely taken him as the object of its interest. The humanitarian doctrine is therefore one of the rare fields where people of all beliefs can meet and stretch out the hand of friendship to each other, without betraying matters which are closest to their hearts.

The following is a good definition of humanitarianism:

Considering the actual fellowship today uniting all the people of the globe and the importance of the mutual advantages from which they benefit and which renders this fellowship inevitable,

considering also that this universal fellowship calls for a common international order and great stability and that consequently this can only be based on justice,

considering, on the other hand, the inequality existing in the condition of individuals, whose character, morals and local customs, as well as the malignity of man, are the cause,

however, admitting that a universal agreement is possible which would take these conditions and the fervent wishes of all races into account,

humanitarianism proposes to place in the forefront of every man's concern the attenuation of injustice, by starting with the most blatant and oppose them on the local as well as on the universal level, so that the struggle may be more effective by mutual aid and emulation between different nations;

it therefore prescribes, in the first place, that recognition be given to all of a certain number of individual rights which it considers to be fundamental,

then in all cases where the existing institutions are insufficient or inactive in order to ensure the application of these rights, it enjoins that aid be given to those in distress, or whose life or physical and moral integrity are threatened,

it calls upon men to unite with a view systematically to prevent a return to evils which are avoidable and to limit the extent of other harmful acts,

it engages them to organize themselves to that effect in the form of private or public, national or international associations, finally, it proposes their final object to be the ripening of all men's personalities, the prime cause of their well-being.¹

An attempt will again be made to show how humanitarianism differs from charity, from which as will be seen later, it derives much of its inspiration.

Charity is a quality which is brought to us from outside and which is presented to us as a moral obligation. Humanitarianism,

¹ Maurice CHALUMEAU, Geneva sociologist, whose studies on humanitarianism have provided us with our most useful material.

on the other hand, originates logically from objective reflection on conditions of living in society and on the fellowship which results therefrom.

Charity demands immediate improvised action on the part of a person finding himself alone in the presence of someone in distress. In humanitarianism it is not sufficient to take a personal share in another's sudden misfortune. The evil itself should be fought systematically, one should try to find out the reasons, however remote, and seek to prevent its ill-effects and finally have it eliminated from the world.

Charity concerns itself above all with righting injustice. Humanitarianism has more positive and larger aims, such as to allow each person to assert his personality and give him his place in the sun.

Charity has an individual character. It is limited in time and space. Humanitarianism collects men of goodwill around itself, creates the necessary institutions and imposes a reasoned discipline. It tends towards universality and extends mercy to all mankind.

If charity is concerned with its effectiveness, it places the greatest value of its acts on the giver's intentions who thereby acquires merit. For humanitarianism it is the act and its result which counts and it does not after all matter in what spirit it has been accomplished.

Charity does not accept the idea of mutual aid. It is a free gift which does not expect any answering gesture. This is both its strength and its weakness. Humanitarianism, on the other hand, addresses itself to an organized world which is endowed with memory. It bases itself, at least in part, on reciprocity. It is however capable of fairness by respecting the principles it raises, even if the adversary does not act in the same manner.

Thus the jurist and the moralist co-operate in the construction of humanitarian law. In the past they still had to introduce into law moral notions peculiar to certain civilizations, notions which Montaigne and Pascal had already shown as being modified on the crossing of each frontier. Today they agree on the ends revealed in modern humanism and which all tend to the well-being of the human collectivity or, at least, when war is taken into account, to a lesser evil. To do this they no longer allow themselves to be guided by outside direction but count on values common to all peoples.

3. Justice and charity

There is still an important problem to be discussed, that of the relationship between justice and charity, these two pillars of society and of their bearing on humanitarianism.

Are justice and charity opposed to each other or do they coincide and can they even be identified? Does one originate from reason and the other from sentiment, as has been claimed, or are they both of the same essence? Can the one do without the other? Can justice be called the rationalization of charity? Finally, does humanitarianism find its inspiration in justice or in charity, or in both at the same time?

Justice consists in rendering each person his due. It presents two principal aspects which should not be confused: there is so-called legal justice and, on the other hand, there is equity.

Legal justice tends to give to each one often according to his merits, above all according to his rights and seldom according to his needs. It implies, for someone who has to take action, strict duties which are sanctioned by law and for which society imposes respect through the judicial and administrative powers which none can avoid.

If one only considers the question of legal justice, one can see that it differs profoundly from charity. It has been represented as a blindfold woman holding scales. This symbol could also to a certain extent apply to charity. Like justice, charity only knows man as a human being without wanting to discover his name. Charity also holds a pair of equally-balanced scales. In the same way as justice, charity also gives to whom it has chosen for valid reasons. But here the analogy ends. For if justice gives to each one according to his rights, charity dispenses according to his suffering or his needs. To judge is to separate between the good and the bad, the just and the unjust, a measure is taken of individual responsibility. Charity, on the other hand, has nothing to do with this sort of justice and refuses to calculate the merits or faults of anyone. It goes very much further and overcoming the conflict between good and evil it reaches complete serenity, achieving wisdom. Then it is the very image of mercy, of goodness without limit. Lao Tse once said:

“With a good man, I am good, with someone evil, I am also good”.

The more one examines the practical possibilities of applying the standards of justice, the more one realizes how full of chance, how arbitrary it is and that it demands much subtlety. The progress which man has made in science and psychological analysis have shown that a variety of interpretations can be given to most motives which rule human action. One sees more and more how, in some dispute submitted to the judgment of a court, the judge finds difficulty in coming to a decision in a manner which is both simple and consistent with his own conscience. Moreover, legal justice, for the sake of greater simplicity, pronounces sentence or dismisses a case according to the facts, whereas a higher form of justice would attempt to weigh up an individual. One should, more often than not, find a compromise between justice and injustice since it is most rare for one side to be entirely wrong and the other to be entirely right. Only simple minds believe in clear-cut solutions. This manichean theory of good and evil inevitably leads to a worsening in most human conflicts.

It should not be forgotten that “man can never claim to do some good which is not mixed with something bad, to defend a truth which does not hide some error or dispense justice which does not bring some element of injustice in its wake”.¹ When the world understands this it will most certainly have made a great step forward in objectivity and consequently towards wisdom and perhaps peace.

Legal and repressive justice has for a long time only taken account of the merits and faults of individuals, since it believed in their full responsibility. It was, however, mistaken. This concept is out-dated. Today, penal reform tends to recover the individual for society and not to crush him, to rehabilitate him rather than inflict punishment on him.

Humanitarianism therefore prefers solutions dictated by compassion to those of an imperfect justice behind which vengeance is barely hidden. In time of war, when justice and injustice become practically indiscernable and when moral standards are shaken, it is

¹ Professor F. LEENHARDT, *op. cit.*

almost impossible to be equitable. If one wishes therefore to act for another's good and alleviate the average plight of individuals, one should allow oneself to be guided by spontaneous generosity.

The pre-eminence of charity, and consequently of the humanitarian ideal, over justice pure and simple is a proof of considerable moral progress and will no doubt mark an epoch in the history of sociology. Moreover, in its most ancient form, charity seems already to have foreshadowed modern concepts on the irresponsibility of human beings, still conditioned by heredity as by the influence of the social circle.

However, as we have already said, the idea of justice knows several graduations. From primitive vengeance it passes through different conditions of law and civilization in time and space, to reach, far beyond legal justice, a very high level. One is no longer in a world of rigid duty, but in one of wide obligations which are left to men's free appreciation and which, at least today, are only morally binding. Here can be found an ideal form of justice which is also called equity and which inspires all those who wish to help others, outside the sphere of legal justice, even in opposition to it. One knows the old adage: *summum jus, summa injuria* and thus Pascal was able to say that real justice derided the law. This justice of which we are now speaking, this equity is then full of understanding and forbearance and is inclined no longer to take account of men's responsibilities, of their merits or their faults, but tends to become egalitarian, that is to say to offer opportunities to all. It is more concerned in bringing to each one what he is lacking than in punishing or giving rigorous treatment. It is no longer a question of applying the usual standards of division, but of repairing the aberrations of fate. Such a concept is an ideal and it is often misunderstood by certain factions which is above their comprehension. Moreover, it is, more often than not, unable to be put into practice by the community which must maintain the social order by more summary methods. However, at the higher stage which we have just mentioned, one can say that justice joins forces with charity and finds its ultimate flowering in it. Humanitarianism is the school of the highest form of justice, that in which charity surpasses the law of men. Reciprocally, universal justice advocated by it is the source of social progress and of the well-being of the greatest number.

It tends to rise towards charity and then foreshadows that new world for which man clamours.

In the last century, the idea originated that the world should be organized on a purely rational basis and relationships between men should be based on strict justice. Some people, in fact, thought that charity runs counter to human dignity. This theory has today gained so much ground that one could well ask whether, in the future monolithic State, the spirit of service could exist and then wonder if occasions would be lacking to carry out charitable acts, but rather the permission to do so.¹

It can certainly be seen that the more society evolves, the more do acts, which were previously dependent only on charity, become those of mere justice. Furthermore, in a world which is still only too often iniquitous, justice appears to be the most important charity of all. And to those who think that by making a gift they are relieving themselves of their responsibilities at a cheap price, one is tempted to say: first of all a little justice! For man today has not only to make donations, which is no solution to the problem. All he demands is merely that society is organized so that each one of us has a decent minimum available.

We have seen that justice, in its highest degree, ends by joining forces with charity. So long, however, as it has not achieved its summit, there will always be room alongside for charity. For this is the generator of initiative and spontaneity. It brings in social relations a human element which the law, impersonal and abstract, does not know. If "justice is to respect individuals, love means advancing towards them".²

(To be continued)

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¹ Jean-G. LOSSIER, *Sur l'esprit de service*, Studia philosophica, Bâle, 1953, vol. XII.

² LOSSIER, *op. cit.*